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October 21, 1997

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
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Re: Universal Service Generic Contested Case
Docket No. 97-00888

Dear Mr. Waddell:

Enclosed are the original and thirteen (13) copies of NEXTLINK Tennessee, L.L.C.'s Brief filed pursuant to the Phase I schedule.

Copies are being served on counsel of record.

Sincerely,

Dana Shaffer

Enclosures
cc: Counsel on Service List

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re:)
) Docket No. 97-00888
Universal Service Generic Contested Case)
)

BRIEF OF NEXTLINK Tennessee, L.L.C.

NEXTLINK Tennessee L.L.C. ("NEXTLINK") hereby submits its Brief pursuant to the Phase I schedule in this proceeding. In this Brief, NEXTLINK addresses all of the Phase I issues that remain in dispute pursuant to the Statement of Stipulations and Contested Issues ("Stipulation") dated October 29, 1997.

I. ISSUE 1: UNIVERSAL SERVICE SUPPORT SHOULD BE LIMITED TO ONE PRIMARY RESIDENTIAL LINE PER CUSTOMER.

The Parties¹ have resolved Issue 1 with the exception of whether secondary residential lines and/or single business lines should receive universal service support. Universal service support should be limited to one line per residential household.

The primary goal of universal service is to provide access to the telecommunications network. See 47 U.S.C. § 254(b). The Act emphasizes the paramount importance of services that "are essential to education, public health or public safety." 47 U.S.C. § 254(c)(1)(A). The Joint Board noted, for example, that "access to emergency service is widely recognized as 'essential to . . . public safety.'" *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Recommended*

¹ The "Parties" herein refers to the Parties to the Stipulation filed by Time Warner Communications of the Mid-South, L.P., Tennessee Cable Telecommunications Association, BellSouth Cellular Corp., Bell South Telecommunications, Inc., United Telephone-Southeast, Inc., Sprint Communications Company, L.P., MCI Telecommunications Corporation, Citizens Telecommunications Company of Tennessee, L.L.C., Citizens Telecommunications Company of the Volunteer State, L.L.C., and the Coalition of Small LECs and Cooperatives.

Decision, ¶ 51 (November 8, 1996). The goal of network access set forth in Section 254(c) is accomplished by providing universal service support to one line per residential household. Universal service subsidies for secondary residential lines or business lines are not necessary to accomplish the goal of universal access.

Business customers should not be entitled to universal service support because directing subsidies to business customers would require a large universal service fund, resulting in higher rates for residential customers. Existing rates for business services do not include any universal service subsidy. To the contrary, business rates are a source of implicit subsidies that help to keep residential rates affordable.² Moreover, no evidence has been presented that suggests that businesses, which have not been the beneficiaries of implicit universal service support, now need that support.

Limiting universal service support to primary residential lines will result in a universal service fund that is reasonably small but will provide basic access to the telecommunications network for all households. Providing universal service support to additional lines, especially as the demand for second lines continues to increase, will require the fund to grow. Support of additional lines, however, is not necessary to provide basic access to the network because, by definition, purchasers of second lines already have access to the network. In order to make essential telecommunications services available to as much of the population as possible, universal service support should be targeted to primary residential lines.

II. ISSUE 3: CARRIERS ELIGIBLE FOR UNIVERSAL SERVICE SUPPORT.

The Parties agree that carriers that comply with 47 U.S.C. § 214(e)(1) should be eligible to receive universal service funds. Stipulation, p. 3. Section 214(e)(1) requires an eligible carrier to provide all supported services over the carrier's own facilities or over a combination of the carrier's own facilities

² The manner in which business rates support residential rates is discussed in more detail in Sections IV and V, below.

and resold facilities and to advertise the availability and prices of the supported services. The Parties also agree that carriers should be required to file for eligible telecommunications carrier status, that carriers not regulated by the TRA should be able to receive universal service funds if they meet the eligibility criteria regardless of whether they participate in this proceeding, that eligible carriers must satisfy the federal advertising guidelines, and that the notice of status requirement for rural carriers will be satisfied when they apply for universal service funds. Stipulation, pp. 3-4, Still unresolved, however, are whether the TRA should impose any additional eligibility criteria and whether the TRA should adopt the federal facilities requirements.

A. Issue 3a: No criteria in addition to those mandated by Section 214(e)(1) should be required for a carrier to be eligible to receive universal service funds.

As noted above, the Parties agree that carriers seeking to be designated as eligible telecommunications carriers must file for such status with the TRA. Such a procedural requirement is not inconsistent with Section 214(e)(1) and therefore may be adopted by a state.

The FCC has held, however, that “the plain language of section 214(e)(1) precludes adoption of additional eligibility criteria beyond those enumerated in that section.” Universal Service Order, ¶ 127. The TRA, therefore, should not impose any additional substantive criteria for eligibility beyond the requirements, set forth in Section 214(e)(1), that eligible carriers be capable of providing all supported services³ and advertise the availability of those services and the prices therefor.⁴

³ The Parties agree that a carrier may obtain a waiver from the requirement that it provide all supported services for a grace period and still be eligible to receive universal service funds. Stipulation, p. 3. See 47 C.F.R. § 54.101(c).

⁴ Eligible carriers should be capable of providing all supported services, but they should not be required to provide all supported services to all customers. Customers should have the choice to receive less than the full panoply of supported services at a reduced rate. If customers choose to receive less than all supported services, they should receive universal service support only for the subscribed services.

B. Issue 3d: The TRA should adopt the federal facilities requirements for eligible carriers.

Section 214(e)(1) requires carriers eligible for universal service funds to provide the supported services using their own facilities or a combination of their own facilities and resold facilities. The TRA should adopt this same requirement, for two reasons. First, Section 254(e) requires carriers receiving universal service support to “use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” Universal Service Order, ¶ 130. Thus, the federal Telecommunications Act of 1996 contemplates that eligible carriers will furnish the facilities used to provide the supported services. This requirement is consistent with the Joint Board recommendation. *Id.* at ¶ 152.

Second, unless and until prices are geographically deaveraged, allowing resellers of finished services or unbundled network elements to receive universal service funds could potentially lead to support of the reseller instead of the provider of facilities. If prices for local exchange service are not geographically deaveraged, a reseller will be able to purchase resale services and/or unbundled network elements in high cost areas for the same rate as in low cost areas. Consequently, a reseller providing service in a high cost area would receive the benefit of the universal service subsidy without incurring the high cost of serving that customer; in contrast, the facilities-based provider, which incurs these costs, would receive no universal service support for that customer.

III. ISSUE 5: SERVICE AREAS

The Parties agree that existing service areas for rural carriers should not be modified until the FCC and TRA jointly agree to change them, and that the service area for non-rural carriers should be no

larger than a wire center. Stipulation, p. 5. The question remains whether non-rural areas should be defined as a wire center or a census block group (“CBG”).⁵

A. Issue 5a: In order to promote competition, service areas for non-rural carriers should be small and the universal service subsidy should be portable.

The area that must be served by an eligible carrier must be small enough to allow competition to develop. This can be accomplished by designating CBGs as service areas, or it can be accomplished by taking a flexible approach that determines the requisite service area based on territory actually served by the carrier requesting eligibility. This flexible approach eliminates barriers to becoming an eligible carrier that may result from adopting rigidly defined service areas, and concomitantly maximizes the development of telecommunications competition.

Use of wire centers or any larger area as the required service area for an eligible carrier may act as a barrier to the development of telecommunications competition. The FCC noted that adoption of the service area of a non-rural ILEC would erect significant barriers to entry. Universal Service Order at ¶ 185. Similarly, a requirement that non-rural carriers must serve an existing ILEC wire center also erects significant barriers to entry, because it requires competitive local exchange companies (“CLECs”) seeking to qualify for universal service funds to conform their service areas to the embedded (and not necessarily efficient) ILEC network. Such a requirement may deter CLECs seeking to qualify as eligible carriers from building efficient networks that meet the needs of present and future customers. Consequently, because CLEC entry would be deterred, customers would have fewer, if any, competitive choices in the local telephone marketplace.

A preferred alternative would be one that promotes competitive neutrality and universal service pursuant to Section 254 of the Act and makes the universal service subsidy portable without imposing

⁵ The Parties further agree on the resolution of Issues 5c (rural carriers service areas defined by the federal Telecommunications Act) and 5d (parties unaware of any areas where customer service requests are not being met).

specific service area requirements on any LEC. Under this approach, an ILEC would be eligible to receive universal service funds when the explicit subsidy is established without having to increase its service area. If the fund is portable, any customer receiving a universal service subsidy would be able to switch to any other eligible carrier and the subsidy would follow the customer to its chosen provider.

This approach provides two immediate benefits. First, it enables the Commission immediately to remove all implicit subsidies currently embedded in LEC rates. Second, it quickly enables end users who are beneficiaries of universal service subsidies to choose their telecommunications provider in the same manner as non-subsidized end users at affordable rates. Moreover, this approach is competitively neutral and does not erect any barriers to entry, because it enables customers to receive service from their carrier of choice.⁶

B. Issue 5b: The service areas for rural carriers cannot be altered by the TRA.

The Parties agree that the service area of an eligible rural telecommunications carrier and the FCC designated study area must be the same. Stipulation, p. 5. The Parties disagree on whether the service area for CLECs applying for eligible carrier status in a rural area should be defined to be the contiguous service areas of the rural ILEC. *Id.* As interpreted by the FCC, the Act does not allow any flexibility for either the FCC or a state to alter the service areas to be served by rural carriers. Universal Service Order, ¶ 187.

The TRA, however, may propose to alter the service areas to be served by rural carriers and submit such changes to the FCC. *Id.* at ¶188. If the TRA seeks to alter the service areas of rural carriers, it should consider the same flexible approach as recommended for non-rural service areas in Section III.A.

⁶ As a practical matter, designating areas as small as census block groups will promote competition nearly to the same extent as the more flexible approach. Designating service areas that are equal to or greater than existing wire centers could inhibit the promotion of competition.

IV. ISSUE 7: DETERMINATION OF AFFORDABLE RATES SHOULD BE BASED UPON THE DETERMINATION OF A REVENUE BENCHMARK BASED ON AVERAGE REVENUES PER LINE.

This issue is in three parts: whether rates set under existing statutes should be considered affordable, whether the TRA must use the federal standards for affordability and, if so, how information should be gathered to apply the federal standards. Although the TRA set existing rates at just and reasonable levels, those rates do not establish a standard for affordability in accordance with universal service reform mandated by the Act. In Phase II of this proceeding, the TRA will adopt a cost study to be used to establish the appropriate benchmark for affordability that will determine which telephone lines qualify for universal service support.

A. Issue 7a: The TRA set existing rates for residential service at a level intended to promote universal service, but that rate contains implicit subsidies that must be eliminated.

The TRA set existing rates for regulated telecommunications services according to well-established regulatory principles that set regulated local exchange carriers' rates at levels that provide those carriers with an opportunity to recover their reasonable expenses and to earn a reasonable rate of return on investment. *See So. Bell Tel. and Teleg. v. Tennessee Public Service Commission*, 202 Tenn. 465, 304 S.W.2d 640 (1957); *FPC v. Hope Natural Gas*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944). At least some of the rates for telecommunications services set under those principles have not been cost-based. Instead, the TRA designed those rates to contain implicit subsidies. For example, basic business rates are set at a multiple of basic residential rates in order to keep residential rates affordable.⁷ See T.C.A. § 65-5-207.

In this proceeding, the TRA must establish affordable rates for basic access to the telecommunications network. Eliminating implicit subsidies that exist in current rates and more

⁷ Implicit and explicit subsidies are addressed in more detail in Section V, below.

efficiently targeting those subsidies to high-cost, low-income customers will enable the TRA to meet the universal service goals of the Telecommunications Act.

B. Issues 7b and 7c: The TRA should adopt the federal definition for determining affordability.

The FCC adopted a revenue benchmark based on nationwide average revenue per line to calculate the support eligible telecommunications carriers would receive for serving rural, insular, and high cost areas. Universal Service Order, ¶ 257. The FCC also adopted the Joint Board recommendation to define the revenue benchmark as average revenue per line, and the FCC tentatively set a national benchmark based on average revenues per line. *Id.* at ¶ 259.

The TRA should adopt the FCC's definition of the revenue benchmark. That is, the revenue benchmark or "affordable" rate should be based on average revenues per line. The TRA should differ from the FCC in only one respect; the revenue benchmark for Tennessee should be based on average revenue per line for Tennessee rather than a national average. *See* Universal Service Order, ¶¶ 260-264 (determine benchmarks for residential and single line business service based on average revenues per line for local, discretionary, interstate and intrastate access services and all other revenues).⁸

V. ISSUE 8: IMPLICIT AND EXPLICIT SUBSIDIES

The Act requires that implicit subsidies be eliminated and made explicit. 47 U.S.C. § 254(e). Under the revenue benchmark proposal, the explicit subsidy is determined by identifying the difference between the cost of serving those high-cost, low-income customers and the amount of revenue benchmark.

⁸ The FCC also recommends setting separate benchmarks for residential and single line business services. Universal Service Order, ¶ 264. Because residential lines have received implicit support, this will result in a lower affordability benchmark for residential lines. In this manner, the affordable rate for residential service in existing rates set by the TRA influence the benchmark.

A. Issue 8a: Implicit subsidies are the amount of revenue per line in excess of the cost of providing that line.

The FCC has identified three potential sources of implicit subsidies: interstate and intrastate access charges, geographically averaged rates, and business line revenues. *Universal Service Order*, ¶ 12. In each case, the ILEC's costs and revenues do not match. Access charges, for example, may greatly exceed the cost of providing interexchange carriers access to the local network. Current access revenues in excess of the cost of providing access service help support universal service by contributing to the ILEC's total revenues and enabling prices for basic residential service to be set at affordable rates. Similarly, geographically averaged prices can result in customers in low cost areas subsidizing the rates of customers in high-cost areas, while higher prices for business lines help to support lower prices for residential lines which are provided at the same cost to the ILEC as business lines.

Because revenues from individual ILEC services are not color coded, it is impossible to determine whether the three sources of implicit subsidies identified by the FCC are the only services that may produce revenues in excess of their costs. Moreover, it is impossible to identify which of those excess revenues are used to support the costs of other services.

B. Issue 8b: To determine implicit subsidies in existing rates, the TRA must identify the services for which ILECs are earning revenues that exceed cost.

Because implicit subsidies occur whenever an ILEC's revenues from a service exceed its cost, including a reasonable return, of providing the service, the TRA must determine the cost of providing each service and compare that cost to the revenue from the service.

C. Issue 8c: To create explicit subsidies, the TRA must identify the level of universal service support to be provided and the recipients of that support.

The amount of the explicit subsidy is the difference between the cost of providing supported services and the benchmark at which universal service support for those services will be available. The amount of the subsidy that is available and any criteria to determine which customers are eligible for universal service support can be set forth by the TRA, pursuant to the requirements of the Act.

D. Issue 8d: The TRA must determine the forward looking economic costs of telecommunications services.

Under the Act, prices for ILEC services must be based upon the cost of providing the service and may include a reasonable rate of return to the ILEC. 47 U.S.C. § 252(d)(1)(A)(i). The FCC determined that the level of universal service support should be based on the forward looking economic cost of providing supported services reduced by a revenue benchmark. Universal Service Order, ¶¶ 224-226. Under the FCC's rules, the TRA can decide to perform its own cost study or rely on the FCC's study. *Id.* at ¶ 248.

The TRA has decided to develop its own cost study in Phase II of this proceeding. That study should determine the forward looking economic cost of each network element in an efficient telecommunications network in a manner that does not give carriers any incentive to inflate their costs or to refrain from efficient cost-cutting. *Id.* at ¶ 226.

E. Issue 8e: Implicit subsidies should be identified on a service-by-service basis.

Implicit subsidies should be identified on a service-by-service basis; however, there may be no need in this proceeding to identify with precision the implicit subsidies currently embedded in existing rates because, by determining the forward looking economic cost of all telecommunications services and establishing universal service support mechanisms based on those costs, the TRA will eliminate all implicit subsidies. Once cost studies are completed, the remaining tasks are, first, to identify the benchmark for providing universal service support and, second, to establish the mechanism for providing that support through reduced rates for the supported services.⁹

VI. ISSUE 9: PRELIMINARY COST MODELING ISSUES.

The Parties agree that only three of the preliminary cost modeling issues identified in Issue 9 should be addressed in Phase I. Stipulation, p. 7. Issues that should be addressed on Phase I include the

⁹ The Parties have agreed upon a list of services to be supported. *See* Stipulation, pp. 1-2.

proper territorial scope of universal service rates (Issue 9b), which service revenues should be bundled in the revenue benchmark (Issue 9j) and the time period that should be used to determine the revenue benchmark (Issue 9k).

A. Issue 9b: Universal service rates should apply throughout the eligible carrier's service area.

An eligible telecommunications carrier should offer universal service rates throughout the carrier's service area.

B. Issue 9j: All revenues per line should be included in the revenue benchmark.

As discussed above in Section IV.B, all revenues should be included in the revenue benchmark because, under existing rates, ILECs receive revenues from a myriad of services, many of which are used to subsidize the price of basic telecommunications service (e.g., CLASS services). Failure to include any of those revenues when setting the revenue benchmark would result in a lower benchmark and, consequently, greater demand for universal service support and a larger universal service fund.

C. Issue 9k: The TRA should employ a reasonable test period for determining the revenue benchmark.

The task of determining average revenues per line is relatively straight forward. All revenues from all services must be summed and divided by the number of existing lines. In order to identify and eliminate anomalies and also to enable the TRA to determine if there are any trends that may affect its determination of the benchmark, the TRA should look at several "snapshots," perhaps monthly or quarterly, for the most recent year for which data are available.

VII. ISSUE 11: EXISTING IMPLICIT SUBSIDIES FOR SERVICES TO EDUCATIONAL INSTITUTIONS SHOULD BE MADE EXPLICIT.

Section 254(e) of the Act requires that implicit subsidies be eliminated and replaced with explicit subsidies. No exception for any existing implicit subsidy is permitted. Existing implicit subsidies for services to educational institutions should be eliminated and replaced with explicit subsidies.

VIII. ISSUE 15: ACCESS CHARGE REFORM SHOULD BE ADDRESSED CONCURRENTLY WITH UNIVERSAL SERVICE REFORM.

One of the sources of implicit subsidies that likely will be replaced by explicit subsidies determined in this proceeding is intrastate access charges. *See* Universal Service Order, ¶ 12. If explicit subsidies are implemented before the implicit subsidies are eliminated, ILECs will receive revenues from the explicit subsidies to be determined in this proceeding as well as from existing access charges. That double recovery for ILECs will harm competition by providing windfall profits to the ILEC, and it imposes excess costs on consumers who must, directly or indirectly, pay for explicit subsidies and access charges.

CONCLUSION

The TRA should adopt the proposed resolution of issues included in the Stipulation. On contested issues, the TRA should adopt the recommendations herein, including: universal service support should be limited to primary residential lines; eligible carriers should be required to provide supported services over their own facilities or a combination of their own and resold facilities and to advertise the availability and price of those services throughout their service territories; service areas for non-rural carriers should be commensurate with their service territories and not adhere to any existing boundaries, and the TRA should consider proposals to alter service areas for rural carriers to be similarly flexible; the affordable (benchmark) rate should be determined based on average revenues per line for all telecommunications services; explicit subsidies should be determined based on the difference between the revenue benchmark and the forward looking economic cost of providing the supported services; existing implicit subsidies for services to educational institutions should be replaced with explicit subsidies; and intrastate access charge reform should be implemented concurrently with universal service reform.

DATED this 12th day of November, 1997.

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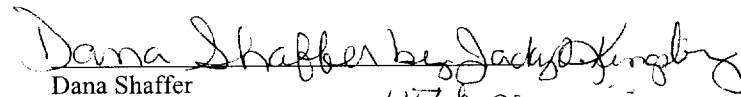
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